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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In The Matter of

Federal-State Joint Board on
Universal Service

CC Docket No. 96-45

**REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), hereby replies to selected comments on Petitions for Reconsideration of the Report and Order¹ filed in the above-captioned matter. Specifically, TRA responds to comments submitted by Time Warner Communications Holdings, Inc. ("Time Warner"), Bell Atlantic, BellSouth Corp. ("BellSouth") and Telecommunications Consultants, Inc. ("TCA"). TRA opposes the contention of these parties that the Commission should further restrict the universe of carriers eligible to receive universal service support or otherwise limit the universal service support available to eligible carriers. A further restriction on the availability of universal service support to carriers providing these critical services will inhibit rather than promote the pro-competitive policies and universal service goals embodied in the Telecommunications Act of 1996.² TRA thus urges the

¹ In the Matter of Federal-State Joint Board on Universal Service ("Report and Order"), CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) ("Report and Order").

² Pub. L. No. 104-104, 110 Stat. 56 (1996).

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Commission to refrain from limiting the universal service support available to carriers providing universal services through a combination of their own facilities and the services of other carriers.

Time Warner and Bell Atlantic continue to contest the plain meaning of Section 214,³ asserting essentially that Congress could not have meant to create universal service funding eligibility for carriers providing service other than predominantly over their own facilities. BellSouth asserts the Commission has created "competitive distortions" by allowing carriers providing services through a combination of their own facilities and the services of other carriers to receive universal service funding ("USF") support and that this decision is not compatible with the concept of "competitive neutrality". TCA objects to the Commission's determination that a carrier's "own facilities" includes unbundled network elements which comprise physical components of the telecommunications network. None of these contentions would warrant a dilution by the Commission of the universal service support due carriers pursuant to Section 214. Indeed, withholding such support to carriers whose "own facilities" consist of unbundled network elements would chill the effectiveness of this particular entry strategy, a result clearly in conflict with the pro-competitive policies of the Telecommunications Act.

By its express language, Section 214 provides that universal service support is available to carriers offering supported universal services "either using its own facilities or a combination of its own facilities and resale of another carrier's services."⁴ No matter how ardently Time Warner and Bell Atlantic would like Section 214 to contain a requirement that carriers must provide service "predominantly" over their own facilities, no such requirement

³ 47 U.S.C. § 214.

⁴ 47 U.S.C. § 214(e)(1)(A).

exists. The Commission has recognized the inadvisability of reading such an extraneous requirement into Section 214 and has rejected attempts to more restrictively define "facilities" in other contexts as well.⁵ The modification requested by Time Warner and Bell Atlantic would be all the more inappropriate in this circumstance, where the Commission has also specifically noted that, unlike other sections of the Telecommunications Act, which affirmatively require the provision of services "either exclusively . . . or predominantly" over a carrier's own facilities,⁶ this requirement is conspicuously lacking in Section 214.

To equate the provision of service through unbundled network elements with "resale of another carrier's services", the Commission reasoned, would make network elements indistinguishable from telecommunications services, an interpretation clearly not supported by the Telecommunications Act.⁷ Just as the Commission has held "[a] 'network element' is not a 'telecommunications service'",⁸ provision of service through unbundled network elements is not "resale of another carrier's services."⁹ Section 214 expressly confers USF eligibility upon carriers providing universal services "using . . . a combination of its own facilities and resale of

⁵ Indeed, contrary to the request of numerous carriers, the Commission has applied a similar definition of "facilities" in its consideration of carrier eligibility for Section 271 authority pursuant to Track A, 47 U.S.C. § 271(c)(1)(A). In that context, the Commission also reasoned that including unbundled network elements within the scope of a carrier's "own facilities" would advance the pro-competitive goals of the Telecommunications Act. In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan ("Memorandum Opinion and Order"), CC Docket No. 97-137, FCC 97-298, ¶ 99 (released August 19, 1997).

⁶ 47 U.S.C. § 271(c)(1)(A).

⁷ Report and Order, FCC 97-157 at ¶ 157.

⁸ Id.

⁹ 47 U.S.C. § 214(e)(1)(A).

another carrier's services." Absolutely no conditions on the combination of the two components exists. Mindful that "section 214(e) does not mandate the use of any particular level of a carrier's own facilities"¹⁰ the Commission, unlike Time Warner and Bell Atlantic, has arrived at a conclusion supported by the letter and spirit of Section 214. That conclusion, no matter how galling to Time Warner and Bell Atlantic, should not be diluted to advance the interests of individual carriers to the detriment of universal service goals overall.

BellSouth argues that by characterizing unbundled network elements as a carriers "own facilities" the Commission has "confer[red] artificial advantages upon certain resellers."¹¹ BellSouth misses a fundamental point. Carriers providing universal services through unbundled network elements are not "reselling" universal services. Rather, they are taking on the responsibility to provide universal services to consumers, including low-income consumers, in rural or high-cost areas, through unique service offerings created by them by combining unbundled network elements as specifically envisioned and sanctioned by the Telecommunications Act. This responsibility is no less weighty than that shouldered by facilities-based incumbent providers; the universal service support guaranteed other carriers is thus every bit as critical (perhaps even more critical) to the continuing ability of such new entrant carriers to provide universal services to consumers.

BellSouth also cautions that severe "competitive distortions" will flow from the Commission's implementation of Section 214. In concluding that all carriers providing universal services through unbundled network elements are entitled to USF support, the Commission was

¹⁰ Report and Order, FCC 97-157 at ¶ 170.

¹¹ Comments of BellSouth at 4.

mindful that it is not always possible to precisely determine the exact costs of providing service to customers. As the Commission has noted, difficulties associated with determining service costs have been exacerbated by the absence of competition.¹² In certain cases, which the Commission anticipates will be both infrequent and short-lived, this difficulty might result in an imprecise match between a competitive provider's service costs and the level of universal service support properly attributable to the provision of such services. The Commission has determined that it is unlikely that carriers will undertake the not insignificant economic burdens associated with competitive entry into the local telecommunications market with an aim toward benefitting from as yet slightly imperfect universal service distributions. The Commission has nonetheless acted to remove the "competitive distortions" described by BellSouth, notably, by capping the universal service support available to purchasers of unbundled network elements. The rapidly approaching deadline for the determination of forward-looking high-cost universal service support further minimizes the negative effects which might conceivably flow from any slight USF imprecision.

The crux of TCA's argument appears to be that the Commission has erred by determining that unbundled network elements which constitute a physical component of the network *are* a carrier's own facilities. Contrary to the opinion of TCA, the Commission has not "misconstrued the definition of 'own facilities'."¹³ While adopting a view which was more restrictive than TRA had espoused, the Commission's determination that unbundled network elements constitute the "own facilities" of entities purchasing those elements is an appropriate

¹² Report and Order, FCC 97-157 at ¶ 172.

¹³ Comments of TCA at 7. Indeed, as the Commission has recognized, "section 214(e)(1) uses the term 'own facilities' and does not refer to facilities 'owned by' a carrier." Id. at ¶ 159.

conclusion which will significantly advance universal service goals and the development of competitive entry strategies.

Noting in particular that "the carrier has obtained the 'exclusive use' of the facility for its own use in providing services, and has paid the full cost of the facility," the Commission has observed that the increased control purchasers of unbundled network elements can exercise over a physical network allows such carriers "to create service offerings that differ from services offered by an incumbent."¹⁴ Accordingly, the Commission reasoned, "as between the two terms, carriers that provide service using unbundled network elements are better characterized as providing services over their 'own facilities'."¹⁵

In determining that unbundled network elements consisting of physical components of a telecommunications network also constitute a carrier's "own facilities" the Commission was mindful of other issues as well. Among these, Congress' strong commitment to fostering the availability of varying entry strategies, specifically including the ability to enter the local market through purchase of unbundled network elements, weighed significantly in favor of the decision reached by the Commission. The Commission has appropriately recognized that "entry by exclusive use of unbundled elements might be common in high cost areas"¹⁶ and by deeming such carriers eligible to receive universal service support has avoided the "creat[ion of] and artificial disincentive for carriers using unbundled elements to enter into high cost areas."¹⁷ The

¹⁴ Id. at ¶ 160.

¹⁵ Id.

¹⁶ Id. at ¶ 165.

¹⁷ Id. at ¶ 166.

Commission correctly determined that competitive neutrality can best be achieved by promoting the availability of universal service support for carriers serving consumers by means of unbundled network elements. TRA urges the Commission to continue protecting the competitive neutrality of all entry strategies by refusing to further restrict the universe of carriers eligible to receive universal service support.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to refuse to restrict the definition of "own facilities" for purposes of determining eligibility to receive universal service support and to reaffirm the continuing availability of universal service support to carriers providing universal services through their own facilities or through a combination of their own facilities and the resold facilities of other carriers.

Respectfully submitted,

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